

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM KEVIN MCCOY,

Defendant-Appellant.

UNPUBLISHED

February 22, 2007

No. 266093

Wayne Circuit Court

LC No. 05-006462-01

Before: O’Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of 1 to 20 years for the drug conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

I. Underlying Facts

On June 10, 2005, a Detroit police narcotics officer conducted “pre-raid surveillance” at 13475 Moran in Detroit. An undercover narcotics buy had previously occurred at the house, which was vacant and dilapidated. The officer, who was approximately 60 feet from defendant, observed defendant sitting on the porch in a “car type seat.” He subsequently observed defendant engage in two separate suspected narcotics transactions. The officer explained that in both transactions, the buyer walked up to defendant, gave defendant money, defendant handed the buyer a small item that he retrieved from a clear baggie, and the buyer left. After the transactions, the officer directed his narcotics crew to execute a search warrant. Officer Michael Bryant testified that when he ordered defendant to stand up, he observed a clear plastic baggie containing several small packets of heroin in the chair where defendant had been sitting. The police confiscated \$54 from defendant’s person. Just inside the front door, the police found a .12-gauge shotgun, and a loaded .22-caliber rifle leaning against a wall. No one else was on the porch or inside the house.

At trial, defendant denied any knowledge of the drugs or guns found at the residence. Defendant testified that he had received \$50 from “J.B.,” the homeowner, to mow the lawn. Defendant admitted that he did not know J.B. before this transaction. Defendant claimed that, after J.B. gave him an advanced payment of \$50, J.B. went to get gas for the lawnmower.

Defendant then sat on the porch to wait for J.B. to return. After sitting on the porch for only three to five minutes, the police raided the house. Defendant claimed that while officers had him handcuffed inside the house, other officers recovered the drugs from somewhere in the back of the house.

The defense presented two other defense witnesses. Defendant's mother testified that when she drove past the Moran residence after defendant's arrest, someone was inside the house. Latoya Jackson testified that her parents live across the street from 13475 Moran, and that a man named "Jeff" lives there. She claimed that on the day of the incident, she heard Jeff offer to pay defendant to cut his grass, and saw Jeff walk down the street with a lawnmower. She claimed that defendant was at Jeff's house for only four or five minutes before the police arrived.

II. Drug Profile Evidence

Defendant first argues that he was denied a fair trial when the trial court allowed impermissible drug profile evidence. Because defendant did not object to the evidence at trial, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

During the execution of the search warrant, the police found one clear plastic baggie containing 50 "multi-colored paper packets" of heroin. Officer Bryant, who had been a member of the Narcotics Division for 6-1/2 years, participated in numerous raids, and had seen packaged heroin on "numerous occasions," testified that, given the packaging and the quantity of packets, the drugs at issue were not consistent with personal use, but were for "quick street sale."

"Drug profile evidence has been described as an 'informal compilation of characteristics often displayed by those trafficking drugs.'" *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence may be admitted if (1) it is offered as background or modus operandi evidence, and not as substantive evidence of guilt; (2) other evidence is admitted to establish the defendant's guilt; (3) the appropriate use of the profile evidence is made clear to the jury; and (4) no expert witness is permitted to opine "that, on the basis of the profile, the defendant is guilty," or to "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty." *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000).

Defendant has not demonstrated a plain error. The challenged testimony is not the type of "drug profile evidence" condemned for use as substantive evidence of guilt. See, e.g., *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995), and *Murray, supra* at 52. Rather, the officer's knowledge of the drug trade was used to help the jury understand the significance of the quantity and packaging of the heroin at issue. Expert police testimony regarding the quantity of drugs found and the packaging is permitted to show that the defendant intended to sell the drugs and not simply use them for personal consumption. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).¹ Additionally, there was substantial evidence supporting defendant's

¹ We note that the prosecutor never moved to qualify the officer as an expert witness at trial. Defendant did not object to this omission, however, and there is no plain error in the prosecutor's
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conviction, including his presence at the vacant house, his proximity to the drugs, and an officer's observation of defendant engaging in two drug transactions. Furthermore, defendant's defense did not relate to the quantity of drugs confiscated and whether they were intended for sale or personal use, but whether he actually possessed the drugs.

To the extent that defendant argues he is entitled to a new trial because the trial court failed to properly instruct the jury on the proper use of drug profile evidence, the record reflects defense counsel's on-the-record expression of satisfaction with the trial court's instructions. Defendant's affirmative approval of the instructions waived any error in this regard. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Consequently, reversal is not warranted on this basis.

III. Upward Departure

Defendant also argues that he is entitled to be resentenced because the trial court did not articulate a substantial and compelling reason for departing from the guidelines when sentencing him to 1 to 20 years' imprisonment for his drug possession conviction rather than an intermediate sanction.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). In this case, the sentencing guidelines range was zero to nine months. If the upper limit of the recommended minimum sentence range is 18 months or less, "the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." MCL 769.34(4)(a). An intermediate sanction does not include imprisonment in a state prison. MCL 769.31(b). Our Supreme Court has reiterated that the phrase "substantial and compelling" constitutes strong language intended only to apply in "exceptional cases." *Babcock*, *supra* at 257-258 (citation omitted). The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having "considerable worth" in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 257, 273. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

Whether a factor exists is reviewed for clear error on appeal. *Babcock*, *supra* at 265, 273. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason

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omission. A police officer may testify as an expert on drug-related law enforcement by virtue of his training and experience. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Given the officer's testimony with respect to his experience in the area of narcotics, he was qualified to testify about the significance of the items found. Consequently, defendant cannot demonstrate any prejudice. *Carines*, *supra*.

to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id.* at 265, 274; see also *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001).

In this case, the trial court stated that it was departing from the guidelines because it believed that when testifying at trial, defendant “lie[d] through [his] teeth so easily and so charmingly,” and presented the “most preposterous, ridiculous defense that [the trial judge] ha[d] ever heard in a drug case,” which “insulted the intelligence of everyone in the courtroom” and implied that “the police were liars.” The trial court stated that, given defendant’s assertion of such a defense, “there is a very reduced likelihood of a redemption . . .” and “a very high degree of concern . . . that the possibility of [defendant] being successfully corrected by a sentence that is usually meted out in these cases is going to occur.” In the departure evaluation form, the trial court reiterated that “[t]he substantial and compelling reason for departing in this case was the manner in which the defendant attempted to defend himself” The court stated that defendant’s “uniquely preposterous” defense “revealed . . . an unabashed disrespect for the justice system thus revealing a very high likelihood that his criminal behavior would be repeated.” The trial court concluded that “[i]t was the nature of [the] defense which rendered him . . . an unsuitable subject for community based sanctions.”

Although a trial court cannot base its sentence on a defendant’s refusal to admit guilt, *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977), other factors, such as a defendant’s failure to demonstrate a lack of remorse, may be considered in determining a defendant’s potential for rehabilitation, *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). In this instance, the trial court specifically denied that any enhancement of defendant’s sentence was related to the exercise of his right to trial or refusal to admit guilt. Rather, the trial court, in departing from the sentencing guidelines, cited to the unbelievable nature of defendant’s asserted defense and lack of truthfulness in testifying under oath as indicators of defendant’s lack of respect for the justice system and, consequently, his diminished potential for successful rehabilitation. As noted by the trial court, in relevant part, in the departure evaluation form:

The jury’s verdict was a clear indication of their disbelief in his testimony . . . and revealed in this defendant an unabashed disrespect for the justice system thus revealing a very high likelihood that his criminal behavior would be repeated.

As such, nothing within the record suggests or indicates that the trial court relied on impermissible factors when sentencing. Rather, the trial court permissibly justified its sentencing departure by explaining that a sentence within the guidelines would not serve the goal of defendant’s rehabilitation and would, likely, not preclude defendant’s recidivistic criminal behavior.

A trial court’s determination that a defendant’s potential for rehabilitation or reformation, or lack thereof, comprises a substantial and compelling reason for deviation from the sentencing guidelines when that determination is supported by objective and verifiable facts. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). The trial court’s determination that defendant’s lack of truthfulness under oath and willingness to, impliedly, engage in perjury is objective and verifiable based on the jury’s outright rejection of the story posited by defendant to explain his presence and possession of drugs and weapons, and not merely a subjective characterization by the trial court. Hence, the trial court’s articulation regarding defendant’s lack

of respect for the justice system, and resultant low rehabilitation potential, comprised a substantial and compelling reason meriting the upward departure from the sentencing guidelines.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot